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Docket No. 82-444

In The

In the Supreme Court of the United States

October Term, 1982

GREITZER & LOCKS, GENE LOCKS and MARTIN GREITZER; NEIL R. PETERSON,

Petitioners,

v.

RAYMARK INDUSTRIES, INC.; PITTSBURG CORNING CORPORATION; H.K. PORTER COMPANY; SOUTHERN TEXTILE CORPORATION,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTRODUCTION

This paper is a reply to the Brief in Opposition to Petition for a Writ of Certiorari filed by four respondent manufacturers in this matter. In the spirit of this Court's rule limiting Petitioners' Reply Brief to new material, we are responding to three crucial points raised by Respondents in their Brief:

I. The non-existence of confidential material;

II. The absolutely incredible suggestion that the Justice Department was coerced into issuing a waiver of imputed disqualification; and

III. The mind-boggling opportunity for this Court to resolve the overwhelming judicial log jam deliberately created by certain asbestos manufacturers.

The Brief submitted by the manufacturers should have provided them with a golden opportunity to demonstrate the soundness of the District Court's decision and show this Court why further review is unnecessary. Instead, it has provided Petitioners with a providential opportunity to point out to this Court the ridiculous level of proof on which the erroneous ouster was predicated. Nothing could be more obviously contrived and misleading than the references in Respondents' Brief to support two key propositions on which they base their argument: 1) the existence of the manufacturers' proprietary information known to the United States government and Peterson, and 2) the Justice Department's somehow being forced by a former employee into waiving the disqualification of Greitzer and Locks.

The intensive review this matter deserves may not be possible at this level. However, such a review would disclose that the facts and propositions relied on below for ouster had no more substance or significance than the tiny shreds of so-called evidence pointed out in the Opposition Brief. It is shockingly replete with unsupported claims that Peterson possesses confidential information which cannot be protected by the screen established by Greitzer and Locks and still expressly approved by the Justice Department. Although they are unable to cite any secret information known to Peterson and not the plaintiffs, except for the noted Glover settlement[1], the manufacturers persist in their argument that Peterson's employers, Greitzer and Locks, should be disqualified from representing 260 asbestos plaintiffs, many of whose cases have been handled by said firm for over five years.

It is an uncontroverted principle of disqualification law that the burden of proof rests upon the party seeking dis-

[1] The Fourth Circuit's majority opinion deals with the issue of the Glover settlement, showing its irrelevance to other asbestos litigation. (Appendix 31,32.)

qualification to show the existence of confidential information if the lawyer who is the subject of the proceedings never represented the moving party. See *Sierra Vista Hospital, Inc., et al.* v. *The United States*, 639 F.2d 749 (Ct.Cl. 1981); *Fred Weber, Inc.* v. *Shell Oil Company*, 566 F.2d 602 (8th Cir. 1977), cert. den. 436 U.S. 905 (1978). Absent confidences running to the moving party, there is no presumption in favor of disqualification. The manufacturers have not even approached this burden except by innuendo and empty allegations.

I. THE NON-EXISTENCE OF CONFIDENTIAL INFORMATION

A blatant illustration of the baselessness of Respondents' position can be seen by examining one of the central theses of their Opposition Brief and a point which constituted one-third of their time on oral argument during the *en banc* hearing. They contend that evidence submitted at the half day evidentiary hearing before the District Court established that:

> Proprietary information about the manufacturers was disclosed to the Navy Bureau of Medicine and Surgery with the understanding that it remain confidential. Peterson had access to this information and his subordinates had direct knowledge of it. Respondents' Brief in Opposition to Petition for Certiorari at 7.

The sole authority cited by Respondents in support of this allegation is Page 778 of the Record filed in the Court of Appeals. "Page 778" consists of a one page excerpt from a deposition identified by the manufacturers as "Page 5 of defendants' exhibit number 350." Record at iii. To assist this Court in evaluating the weight to be accorded Respondents' claims, Petitioners have included as Supplemental Appendix A, pages 3-8 of the deposition from which the page is extracted.

The passage quoted and relied upon by Respondents as the only support for their claim that Peterson possesses proprietary information is not found in a deposition which was

taken *for these proceedings*. Nowhere was the information shown to ever have been communicated to Peterson, and it has not been established that the documents referred to were withheld from others. The passage consists of one paragraph of unsworn remarks by Peter Nowinski, a Justice Department Attorney, regarding documents subpoenaed by the manufacturers for the deposition of a witness, Dr. Belianca. Nowhere does Dr. Bellanca testify regarding proprietary information. Neither in his deposition nor in the countless others similarly filed and *not read*, nor in the evidentiary hearing before the District Court, did any witness testify regarding information proprietary to the manufacturers held by the Navy Bureau of Medicine and Surgery. It is surely the acid test of the insignificance of this proprietary information that Peter Nowinski testified for Greitzer and Locks at the evidentiary hearing below, and was never examined on this point by the defendant manufacturers. Nowhere is there any proof of its *relevance*, or that it is protected from discovery.

Furthermore, it is extremely unlikely that the District Court relied upon the unsupported reference to the so-called proprietary information, or that the District Court even knew that such a statement was buried in the record. Nowhere is it alluded to in the District Court's opinion. There is no reason to believe it was ever read to the Court or distinguished from the hundreds of similar documents simply introduced to the Court by the boxload.

Despite numerous opportunities to present *proof* of confidential and proprietary information, the manufacturers have not produced one single document or exhibit, in open court or in camera, to demonstrate that such information exists. This Court can be certain that with the manufacturers' vast resources and perseverance, they would have produced proof of proprietary information about the manufacturers had it existed. Where are the documents referred to in page 778 of the record? Even if there were such "proprietary information," a mere second year law student would recognize that it would be readily discoverable by asbestos plaintiffs, as was pointed out from the bench, in the *en banc* hearing below.

II. INDEPENDENCE OF THE GOVERNMENT'S WAIVER

The manufacturers would also have this Court believe that the Department of Justice, the nation's largest litigant, was strong-armed by Peterson and his attorneys into issuing the waiver. (Brief of Respondents at 5, 6 and 20.) References to the following cross-examination of John J. Farley, Justice Department Attorney, by counsel for Johns-Manville are cited to support this absurd argument:

> By Mr. Montgomery:
>
> Q. In fact, the meeting . . . Mr. Rogovin requested that the meeting take place before the Office of Legal Counsel issue its memorandum; did he not?
>
> Mr. Farley
>
> A. I don't know that of my own knowledge.
>
> Q. Did you hear Mrs. Patricia King state that last week?
>
> A. Yes, sir.
>
> Q. Do you have any knowledge or information to refute that?
>
> A. No.
>
> Record at 344-345.

Mr. Farley acknowledged that he had no knowledge to refute Mrs. Patricia King's statement that a meeting was requested before the Office of Legal Counsel issued its memorandum. There is no evidence of pressure or coercion. The manufacturers completely distort and take out of context the testimony of Mr. Farley and Mrs. King by suggesting that the Justice Department would or could be overborne. This is just another typical example of how Respondents seek to impugn Peterson and those associated with him by misleading references to irrelevant portions of testimony taken out of context.

It is clear from these passages, which are typical of the arguments made by the manufacturers throughout these proceedings, that their entire effort is based upon fallacy and mere assumption. The so-called facts relied upon by Respondents are nothing more than a body of allegations, repeated time and again to give them an aura of credibility. One looks in vain through the pages of the District Court opinion for any hard evidence cited in support of the manufacturers' allegations or the Court's decision.

This Court is a forum where counsel fire their best and most persuasive shots. But the manufacturers have come up with nothing more than (i) remarks from other litigation which likely never came to the District Court's attention, and (ii) "evidence" of the Justice Department's capitulation in the form of a meaningless statement by one attorney that he could not refute another's testimony that a meeting took place prior to issuance of the waiver.

III. OPPORTUNITY FOR COURT TO RESOLVE NATIONWIDE UNCERTAINTY REGARDING STAY

Respondents have inappropriately suggested that this Court should delay action on this Petition due to the fact that Johns-Manville had filed a bankruptcy petition. Petitioners have been tempted to include in this Reply the short narrative and argument submitted to this Court in response to Johns-Manville's Motion to Defer Consideration of Petition for Writ of Certiorari During Pendancy of Automatic Stay Under 11 U.S.C. ¶362(a)(1). The paper succinctly points out the delays and history of this matter, perhaps more thoroughly than does our original Petition. It also addresses Manville's argument regarding the applicability of the Bankruptcy Code's automatic stay to these proceedings and the Respondents' argument relating to the severance of Johns-Manville from its co-defendants.

In lieu of repeating their argument herein, Petitioners are delivering to the Clerk additional copies of the previously filed paper in the hope that it will be distributed to all mem-

bers of the Court and considered in conjunction with this Reply.[2]

The manufacturers are endeavoring to make the stay arguments in every forum. Granting an appeal to your Petitioners will facilitate consideration of the stay issue, which has been called to this Court's attention by the manufacturers. It gives this Court an immediate opportunity to resolve an issue now confronting the judicial system nationwide, with voluntary bankruptcy petitions already filed by two manufacturers. The District Courts, the Bankruptcy Courts and the Appeals Courts will be inundated with staggering numbers of cases on this issue alone. The potential economy to the judicial system and the tremendous service to the bench and bar which could be served by this Court's resolution of the stay issue is breathtaking. If this Court resolves the stay issue in connection with this matter, it can clear many courts throughout the country of stymied cases and cluttered dockets. This Court can prevent and relieve the huge log jams and render a tremendous service to countless plaintiffs who await trial while the courts decide whether the Bankruptcy Code's stay applies to the many solvent manufacturers.

CONCLUSION

Surely this Court is too astute to be taken in by the repetition of allegations as though they were proven facts. The facts that (i) the District Court required no proof and (ii) that the manufacturers continue to distort the evidence and to lead the Courts into error go to the heart of the need for this Court to review the process for the disqualification of counsel.

Where have the manufacturers demonstrated that they have satisfied their burden of proof? Their failure to meet

---

[2] The United States District Court for the Eastern District of Virginia, in response to a similar motion, held that the §362(a) stay provision *does not* apply to Johns-Manville's co-defendants. Pages 1-3 of the District Court's opinion are included as Supplemental Appendix B.

this fundamental burden is a reminder that the original Motion to Disqualify was filed without the supporting affidavit required by law. When the issue was raised by Petitioners, an affidavit was belatedly signed and filed by Johns-Manville's attorney and subsequently withdrawn over Petitioners' vehement protests, preventing Petitioners from showing how patently unsupported were its allegations. (Record at 279.) The District Court, painfully aware of the inadequacy of the Johns-Manville affidavit, allowed its withdrawal. In addition, the Court virtually required the parties to hold an evidentiary hearing, wherein the only evidence offered by the manufacturers consisted of boxloads of exhibits related to other proceedings. From a review of the District Court's decision, it is questionable whether the Court ever considered such evidence.

Notwithstanding Respondents' arguments, no one can dispute the fact that there is a total lack of evidence of confidential information in the record. The manufacturers fail to show this Court how the record supports their arguments and satisfies their burden of proof. Petitioners hope that by presenting these uncontrovertible aspects of this matter, this Court can be persuaded to grant certiorari to review the disqualification proceedings to give a final chance for rescue from the harsh and improvident decision which dashed the hopes of 260 plaintiffs in the name of a principle which does not exist.

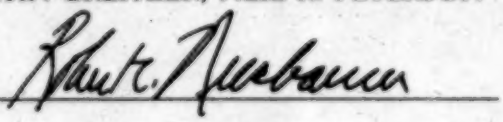
Any question of appearance of impropriety fades away when analyzed in light of the factual underpinnings of the manufacturers' motion to disqualify and the relationships among the asbestos litigants. Petitioners have always agreed that Peterson's activities, as recited by Respondents, are a sufficient basis for disqualifying him from the Virginia litigation. However, those activities become virtually meaningless vis-a-vis Greitzer & Locks, when it is recognized that for all practical purposes, the United States is now permanently and totally out of this litigation. This is so despite the prolonged efforts of the manufacturers to keep the United States involved, contrary to convincing evidence and well estab-

lished law affording the government a defense. Petitioners have made it clear to every court, and it is not disputed, that the manufacturers and the government were never litigating partners, but were always adversaries, not possessed of the other's confidences, except perhaps in one or two very limited and unimportant minor respects which could not conceivably confer any litigating advantage. A careful review of the facts, or lack of facts, set forth in Respondents' Brief and the posture of the parties in the underlying litigation makes it clear that even the "mere possibility of taint" is little more than a figment of the manufacturers' imagination unsupported by the record, and erroneously relied upon by the District Court below.

By granting a writ, this Court can also put to rest the issue of the stay which is plaguing the entire country and threatening to undermine the chances for countless sick and dying plaintiffs to recover against solvent companies.

Petitioners respectfully submit that their Petition for Writ of Certiorari be granted.

GREITZER & LOCKS, GENE LOCKS and
MARTIN GREITZER, NEIL R. PETERSON

By 

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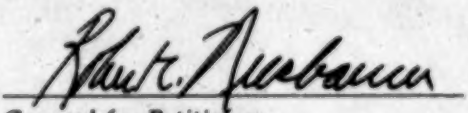
CERTIFICATE

I hereby certify that I have served three (3) copies of the foregoing Reply to Brief in Opposition to Petition for Writ of Certiorari to all counsel of record this 3rd day of November, 1982.



Counsel for Petitioners

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RAYMARK INDUSTRIES, INC.;
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Respondents.

SUPPLEMENTAL APPENDIX TO REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OLIVER H. VAN BUSKIRK	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 79-548
	:	
THE UNITED STATES OF AMERICA, *et al*	:	
Defendants	:	
	:	
ZELPHIA D. CORSETTE	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 78-3071
	:	
JOHNS-MANVILLE CORP.	:	
JOHNS-MANVILLE SALES CORP.	:	
and	:	
OWENS-CORNING	:	
FIBERGLAS CORP.	:	
Defendants	:	

Washington, D.C.
Monday, August 20, 19 . .

Deposition of

DR. JOSEPH J. BELLANCA,

a witness, called for examination by counsel for a defendant, JOHNS-MANVILLE, pursuant to Notice, at the Washington Hilton Hotel.

Thereupon,

DR. JOSEPH J. BELLANCA,

a witness, was called for examination by counsel for a defendant, Johns-Manville and, after having been duly sworn by the Notary was examined and testified as follows:

MR. NOWINSKI: Tom, before you begin, I would like to make a couple of statements. The first is to give advice to everyone in attendance that Dr. Bellanca was produced at your request to testify as a fact witness at this deposition and he has been produced in this capacity as an individual and not as a representative of the United States. He has not been designated by the United States as an officer, director, managing agent, authorized to make any statement by or on behalf of the United States on any subject. And his testimony that he may give at this deposition is outside of the scope of the agency or his employment by the United States, notwithstanding in the event of the death or inability of the witness to testify, pursuant to Section 804A in the Federal Rules of Evidence, this deposition will not be used for any purpose against the United States in any proceeding to which the United States is not presently a party and thus has no meaningful opportunity or notice to develop the witness's testimony.

MR. DeLORENZO: Off the record.

(Discussion off the record.)

MR. DeLORENZO: Do you have something else?

MR. O'CONNOR: That is your position. That is what you are saying.

MR. NOWINSKI: Yes.

MR. O'CONNOR: No one is bound by that. The Court will decide that.

MR. LOCKS: Did everyone stipulate to that?

MR. O'CONNOR: No.

MR. DeLORENZO: Do you have anything else to say?

MR. NOWINSKI: Yes, I do. I want to add a statement in regard to the request for production of documents. We have not brought any documents with us and have none with us at the time. The documents as described have been marshalled and I hope to begin producing documents after the noon recess.

A search was conducted for all documents which mentioned or were related to or appeared to be related to the broad subject of asbestos. Dr. Bellanca is the person who initiated and supervised that search. The search included archival records of the Navy's Bureau of Medicine & Surgery. The search was made at the request of the Department of Justice, and documents were searched for and marshalled up until 9:00 o'clock p.m. last night, which is in part why we don't have them available this morning. The documents that have been marshalled are estimated to consist of approximately 12,000 pieces of paper and, as I mentioned, they are being reviewed right now by representatives of the Department to determine whether any privileges are applicable and for relevancy.

And I will tell you now that there are some documents which reflect manufacturers' proprietary information. Apparently, the Navy Bureau of Medicine & Surgery was permitted to obtain such information upon representations that it would be maintained as confidential. And I have asked that such documents be polled from the group marshalled by Bureau of Medicine, and I would be happy to discuss them with you to see if perhaps parts can be expunged or the manufacturers' consent can be had to release them.

As of this moment, there is one relatively small group of documents which has not been marshalled, and it consists

of about the last six months of records that have been received or generated by the Special Correspondence Section of Bureau of Medicine, primarily consisting of what I think can fairly be characterized as routine congressional and individual medical inquiries. And as I understand it, most of such inquiries are responded to with a form letter. If you decide you don't want that, let me know so that we won't have to go any further than necessary. If you do want it, we anticipate now we can have it in a couple of days.

I also want to address specifically some of the categories in the subpoena which has been quashed but nevertheless, I think is appropriate to avoid any misunderstanding about the effort we have made. First of all, in category number four of the attachment to the subpoena, request was made for all documents in Dr. Bellanca's custody arising from inspections, tours, and inspections to naval yards or shipyards where asbestos containing products were observed.

The Government's position was that a claim of privilege attaches to certain post-1969 audits or investigations of naval shipyards to determine compliance with Navy instructions and regulations regarding the use of substitute materials and personal protection plans. These documents will not be included in those produced.

MR. DeLORENZO: Are you done?

MR. NOWINSKI: No, I have a couple more.

MR. DeLORENZO: Go through the whole thing and I will then make some statements.

MR. NOWINSKI: In regard to category number six which requested all personal documents which come within the scope of the preceding five descriptions in the attachment, I want to advise that the Doctor made no effort to review his personal textbooks or what he refers to as his "Reprint File," which is the file he maintains; and consists of articles he has torn out of various medical journals from time to time.

Finally, with respect to category number seven, which requests documents from all subordinate units, agencies, shipyards, or other governmental organizations subordinate to the Bureau of Medicine & Surgery, I want to inform you that we made no attempt to search any so-called subordinate commands such as hospitals, dispensaries, clinics, Naval Research, medical research laboratories, or other medical facilities under the cognizance of the Navy's Bureau of Medicine & Surgery, and which exist throughout the world.

Lastly, I want to state for the record that the Government requested a postponement of this deposition for the reason at some point in time last week it appeared we would not be in a position to make available all of the documents that we deemed responsive to your requests at the beginning of the deposition, and suggested that it would save everybody time and inconvenience if we could complete that production before and allow you a time to review the documents before convening the deposition. You declined that offer or suggestion. But it is the Government's position we would vigorously oppose any effort to re-depose Dr. Bellanca, for the reason that you didn't have all the documents available to you when you first convened the deposition, because we would have preferred to have done it in another way.

MR. DeLORENZO: Okay. First, the Special Correspondence Section material I would like to have that produced. I would like you to keep searching for that.

MR. NOWINSKI: All right.

MR. DeLORENZO: Number two, I believe on item 4 on the attachment to the subpoena, you indicated that that is the item that you have a claim of privilege to after 1969. Is that correct?

MR. NOWINSKI: Well, I referred, hopefully, to specific post-1969 audits or investigations which might have been encompassed in your description number 4.

MR. DeLORENZO: What privilege is that?

MR. NOWINSKI: Well, act of relevance and Section 407 of the Federal Evidence Code relating to the public policy affecting . . .

SUPPLEMENTAL APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

JAMES T. OMAN, FRED R. WALKER, HUGH V. REYNOLDS, and WILLIE GIBBONS, *Plaintiff,*	)	
v.	)	CIVIL ACTION NO. 82-22-NN
JOHNS-MANVILLE CORP.; JOHNS-MANVILLE SALES CORPORATION, Successor by merger with Johns-Manville Products Corporation; RAYBESTOS-MANHATTAN, INC.; H.K. PORTER COMPANY; SOUTHERN TEXTILE CORPORATION; and PITTSBURG CORNING CORPORATION; *Defendants.*	)	

MEMORANDUM OPINION

The defendants have raised several post-jury verdict issues seeking to stay further proceedings or to set the verdict aside. The parties have briefed the issues and they are now ripe for decision.

MOTION TO STAY ENTRY OF JUDGMENT
(Filed by all defendants)

The defendants have moved that this Court stay all further proceedings against them, including the entry of judgment, because of the recent Chapter 11 reorganization filing of the defendant Johns-Manville Corp. The defendant relies on 11 U.S.C. § 362(a)(1) which provides:

> A petition . . . operates as a stay to all entities, of:
>
> (1) . . . Proceeding against the debtor or other proceeding against the debtor that was . . . commence[d] before the commencement of the case under this title . . .

The defendants argue that when 362(a) refers to "all entities" it is referring to codefendants who are also liable to a creditor of the bankrupt. The Court believes this to be an overly expansive reading of the statute.

The defendant cites as support the case of *In Re White Motor Credit Corp.*, 11 Bankr. Rep. 294 (Bnkr. N.D. Ohio 1981). In *White*, the Court did stay all proceedings in which the debtor was involved. The Court stated that the stay operates as "a windfall benefit to codefendants." However, without commenting on the correctness of the *White* decision, this Court does not feel compelled to follow it. The Court feels the better course to follow is to give the statute a literal reading. The statute refers to proceedings against the *debtor*. This is in line with the Code's desire to relieve the debtor of some of his financial burdens and thus allow the debtor to get his finances in order. It is also apparent from a literal reading of "to all entities" refers to those persons (creditors) who may be acting adverse to the debtor's rights. It is difficult for the Court to see how staying proceedings involving codefendants or staying the entry of judgment against codefendants will help the debtor at all. More importantly, it is difficult to see how not staying the entry of judgment will prejudice the debtor in any way. Certainly, such has not been established in this case.

There are hundreds of asbestos cases against numerous defendants pending in this Court. Johns-Manville has filed for reorganization and not for straight bankruptcy under the Act. It might take some months for the Bankruptcy Court to determine if Johns-Manville is in fact in such present financial jeopardy as to entitle it to proceed under the Act. If the Bankruptcy Court determined that Johns-Manville was ineligible and dismissed the petition, the temptation might be great for another defendant to follow the same path as had been followed by Johns-Manville. This could be done by each defendant consecutively, thus delaying the rights of the plaintiffs to a reasonably prompt adjudication of their Complaints.

/s/ J. Calvitt Clarke, Jr.

United States District Judge

October 20, 1982
Norfolk, Virginia